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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
08/044,240	04/07/1993	MICHAEL MC HALE	1391-1275	6731

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EXAMINER

SHERER, CURTIS EDWARD

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 08/24/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

08/044,240

Applicant(s)

MC HALE ET AL.

Examiner

Curtis E. Sherrer, Esq.

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 07 June 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-28, 51-56 and 65-68 is/are pending in the application.
- 4a) Of the above claim(s) 7, 11-14, 16, 17, 22-27 and 29-50 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-6, 8-10, 15, 18-21, 28, 51-56 and 65-68 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

**DETAILED ACTION**

As stated in the last Office action, the instant application was re-opened for prosecution because, while the Board of Patent Appeals and Interferences has found the claims directed to an undulating pattern of the second mass to be allowable, other members of the Markush group have yet to be examined. The claims containing allowable subject matter in view of the prior art are 8, 10, 18-21 and 51-56. The restricted claims are 7, 11-14, 16, 17, 22-27, and 29-50. The next Markush member that will be examined is "a pattern of stripes across a width of the [sheeted chewing gum] product" as recited in claim 1. This limitation is embodied in claims 1-6, 9, 15, 28 and 65-68.

***Claim Rejections - 35 USC § 112***

Claims 1-6, 8-10, 15, 18-22, 28, and 51-56 and 65-68 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Again, Claim 53 is considered indefinite because it is unclear how it further limits Claim 51, i.e., Claim 51 is directed to multi colored chewing gum.

Again, Claim 56 is considered indefinite because it is unclear how it further limits Claim 51.

Again, Claims 1, 15, 18, 20, 21, and 67 use the term "generally" in describing a physical characteristic of the product and the scope of this term is unknown.

Claim 65 is indefinite because the scope of the phrase "generally perpendicular" is unknown.

***Claim Rejections - 35 USC § 102***

Claims 1, 2, 4, 5, 15, 65, 67 and 68 are rejected under 35 U.S.C. 102(b) as being anticipated by Faust (Design Pat. No. 271,344).

Faust discloses two color chewing gums that are designed so that a second mass of chewing gum is imbedded into a first mass of chewing gum. While the design patent does not disclose the process by which it was made, the process limitations are not found to be limiting. The second mass is in a pattern of stripes (that includes the first mass) across a width. A measurement taken of the volume of the gum pictured in the patent shows the volume to be about 22% and this would translate into relative weight.

With respect to the process limitations in the instant product claims, it is not seen how they would produce a product different than what is disclosed. These limitations are given weight as far as they would influence the final product's characteristics.

***Claim Rejections - 35 USC § 103***

Claims 3, 9, 28 and 66 are rejected under 35 U.S.C. 103(a) as being unpatentable over Faust in view of Jones (U.S. Pat. No. 1,855,145) and in further view of applicants' admissions (page 1 of specification).

Faust teaches that cited above, i.e., two layer chewing gums, with one imbedded in the other, so that the top layer is not viewable from the bottom. It is not disclosed where the gum has at least three stripes. Jones teaches the production of an edible article that is made of two different masses of different colors and flavors where the upper mass cannot be seen from below and is in the shape of a stripe. See fig. 10, page 1, lines 1-39, 50-56 and page 2, lines 35-39. It

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would have been obvious to those of ordinary skill in the art to modify the chewing gums of Faust to resemble the confectionary of Jones, e.g., present the second mass in the form of a striped pattern because as the consumer bites the gum "a changed composition is encountered." (Page 1, lines 34-39).

None of the cited art teaches the production of gum in a rolled up tape configuration or as a plurality of stripes. Applicants admit the prior existence of a product called BUBBLETAPE, whereby bubble gum is rolled up in a tape. (Page 1, lines 10-14). It would have been obvious to those of ordinary skill in the art to modify the chewing gum of Faust in view of Jones so that they would be in the form of a rolled up tape in order to provide more interest to the consumer. In such a form, there would have to be a plurality of stripes so that the teaching of Jones would be realized, i.e., "a changed composition is encountered."

There is further motivation to produce a gum with diagonal stripes, as also evidenced by applicants' admissions. On page 1, of the instant specification, applicants admit that FRUIT STRIPES uses diagonal dyed stripes and therefore, this pattern is well known in the gum industry. It therefore would have been obvious to those of ordinary skill in the art to produce the gum of Faust in view of Jones in the pattern admitted to by applicants because it is a desired appearance.

Finally, Applicants' attention is invited to *In re Levin*, 84 U.S.P.Q. 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art

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of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function. *In re Benjamin D. White*, 17 C.C.P.A. (Patents) 956, 39 F.2d 974, 5 U.S.P.Q. 267; *In re Mason et al.*, 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 U.S.P.Q. 221.

### ***Response to Arguments***

Applicants' arguments filed 06/01/04 have been fully considered but they are not persuasive.

Applicants argue that claim 53 further limits claim 51 because the first gum could be multicolored. Applicants provide no basis for this argument. Secondly, the claim requires that the second gum be distinguishable from the second gum, and therefore it would inherently be of a different color. Nothing in the spec shows that the first and second gums are the same color.

With respect to the product by process limitations of claim 56 further defining the product of claim 51, applicants argue that other processes could be used to form the claimed product. The processes mentioned would still form the same product and therefore it is not seen how the process limitation would further limit the claimed product.

Applicants argue that those of skill in the art would know the scope of the claim term "generally." While they refer to the drawings contained in the instant specification, these do not add any clarity to the term's meaning. Without more explanation as to the exact meaning of the term, it is still considered to be indefinite.

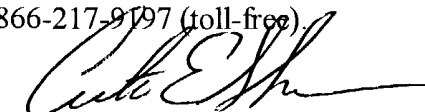
### ***Conclusion***

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Curtis E. Sherrer, Esq. whose telephone number is 571-272-1406. The examiner can normally be reached on Tuesday-Friday, 8AM-6:30PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Curtis E. Sherrer, Esq.  
Primary Examiner  
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